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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

DALE BOZZIO, individually and on behalf of all others similarly situated, Plaintiff, v. EMI GROUP LIMITED; CAPITOL RECORDS, LLC; EMI MUSIC NORTH AMERICA, LLC; EMI RECORDED MUSIC; and EMI MARKETING, Defendants.	Case No. 4:12-cv-02421-YGR **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)** The Honorable Yvonne Gonzalez Rogers Date: Aug. 28, 2012 Time: 2:00 p.m. Place: To be Determined

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INTRODUCTION

This case arises from the widespread and systematic breach of recording contracts involving legacy musicians. Record labels are paying these musicians a fraction of what they are owed when digital versions of their songs are streamed, downloaded, or installed on phones as ringtones. Plaintiff Dale Bozzio ("Plaintiff" or "Bozzio") respectfully requests that Defendant Capitol Records LLC's ("Capitol" or "Defendant") Motion to Dismiss First Amended Class Action Complaint For Failure To State a Claim Under Federal Rule of Civil Procedure 12(b)(6) ("Motion to Dismiss" or "Mot.") be denied.

By this motion, Capitol asks this Court to interpret the contract at issue to give Capitol the exclusive financial benefit of an artist's work in perpetuity, and that the artist—Plaintiff Dale Bozzio—has no meaningful recourse. Capitol's position has already been rejected by several federal district courts in nearly identical situations. These courts have granted artists such as Bozzio the right to pursue their claims for their wrongfully withheld royalties.

Capitol moves to dismiss Bozzio's claims on three meritless grounds. The pillar of Capitol's first argument rests upon the faulty premise that an ambiguous contract provision in a 1983 contract amendment strips a real party in interest and third-party beneficiary of standing to bring a breach of contract claim. Capitol cites no authority for this proposition. In fact, it is well-settled law that the interpretation of a waiver provision, such as the one at issue here, presents factual issues that cannot be resolved on a motion to dismiss. Moreover, even if the Court were to entertain the notion that Bozzio contractually waived her right to sue Capitol, Bozzio's First Amended Complaint ("FAC") alleges sufficient facts—which must, for purposes of this motion, be taken as true—demonstrating that Capitol is estopped from asserting the waiver through its independent dealings with Bozzio, and that the exception to the waiver provision has been triggered. Furthermore, under Bozzio's reasonable interpretation, the clause does not encompass the claims asserted in the FAC.

Second, Capitol's attempt to avoid liability through a three-year statute of limitations clause also lacks merit. Under the facts as pleaded, the limitations clause does not apply. Also,

California's "discovery rule" precludes dismissal. Further, the clause is ambiguous and therefore dismissal would be improper for this reason as well.

Finally, Capitol's argument for a heightened pleading standard for the Unfair Competition Law claim ignores this Court's previous ruling in the related *Beltran* action and a recent order by the Honorable Susan Illston in a similar case against Universal Music Group. Capitol attempts to rewrite Bozzio's claim as one sounding in fraud, which it is not.

Bozzio has alleged sufficient facts to entitle her to proceed on each of the four claims. Capitol's motion should be denied in its entirety.

STATEMENT

Plaintiff Dale Bozzio is a singer, performer, songwriter, and recording artist (FAC ¶ 20). She was lead singer and front woman for Missing Persons, the Los Angeles New Wave band she co-founded in 1980 (*ibid.*). Capitol Records signed her and the other two band members to a record deal in 1982 (*ibid.*).

Under this 1982 contract (the "Personal Services Agreement"), Bozzio and her fellow musicians, professionally known as Missing Persons, agreed to record songs for Capitol (FAC ¶ 46). Capitol agreed to commercially exploit these master recordings (*ibid.*). And Capitol agreed to pay royalties on the income generated from the sale and licensing of this music (FAC ¶ 52).

In 1983, for the convenience of all the parties, the members of Missing Persons formed a corporation to "loan out" their creative services to Capitol Records (FAC ¶ 22). At the same time, the parties to the Personal Services Agreement amended that agreement via a loan-out agreement (the "Loan-Out Agreement") (FAC ¶ 48). Pursuant to the Loan-Out Agreement, Missing Persons, Inc. was substituted as the contracting party with Capitol Records, expressly to benefit Bozzio (FAC ¶¶ 49, 74).

Missing Persons performed its obligations to Capitol Records by recording masters for Capitol, which Capitol released as long-playing record albums (FAC ¶¶ 20, 145). After the artists kept their end of the bargain, the band broke up in 1986 and the loan-out company became a suspended corporation in 1988 (FAC ¶ 22). Meanwhile, Capitol commenced direct dealings with Bozzio (FAC ¶ 89). In 1985 and 1986, Capitol bound her (doing business as publisher Life After

Music) in connection with the recoupment of certain advances made to Missing Persons, Inc. (FAC ¶¶ 22, 90). And, in connection with the Missing Persons songs she wrote, Capitol sends publishing royalty statements and payments in her name to her Massachusetts home (FAC ¶ 91).

Under the royalty schedule set forth in the Personal Services Agreement, as amended, Bozzio and the other artists are to be paid differently depending on whether the transaction takes the form of a sale or a license (FAC ¶ 52). Bozzio is supposed to be paid between 7% and 24% of the price, depending on several variables, when Capitol sells physical products (FAC ¶ 55). Bozzio is supposed to be paid much more—50% of Capitol's net—when Capitol licenses the masters to third parties (FAC ¶ 59). The huge difference between the amounts takes into account the expenses Capitol incurs in connection with an inventory of physical products—manufacturing, packaging, storage, shipping, breakage, loss, returns, and the like—expenses that are absent from licensing arrangements (FAC ¶ 116).

Missing Persons songs are now streamed over the Internet and distributed as permanent downloads and cell phone ringtones (collectively, "Digital Content") by third parties such as Spotify, iTunes, and MTV (FAC ¶¶ 21, 32, 36, 39). But Bozzio and other members of the Class are legacy artists who signed standard record contracts that did not expressly anticipate the digital music revolution (FAC ¶ 119). Logic dictates that income generated from Digital Content distribution derives from masters licensed, not physical products sold (FAC ¶ 116). The Ninth Circuit agrees, as a matter of law (*see F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958, 964–67 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1677 (2011); FAC ¶ 2).

Defendants, however, have breached their contracts with Bozzio by paying Digital Content royalties based on the sale equation rather than the license equation (FAC ¶ 146). This conduct is part of a broad scheme—each of the "Big Four" recording giants have systematically breached their record contracts with all their legacy artists (FAC ¶¶ 160, 162). This treatment is in keeping with the recording industry's disgraceful tradition of "purposeful neglect" of its royalty participants (FAC ¶¶ 15, 162).

On May 11, 2012, Bozzio filed a class action complaint asserting four claims, including breach of contract and violation of California's Unfair Competition Law (*see* Dkt. No. 1). On June

11, Capitol Records moved to dismiss pursuant to Rule 12(b)(6) (*see* Dkt. No. 5). Taking into account this Court's order in the related *Beltran* case, Bozzio filed her FAC on July 9 (*see* Dkt. No. 12).

Capitol now moves to dismiss on three grounds. First, Capitol argues that the entire FAC should be dismissed because Bozzio expressly waived her right to assert any claims regarding nonpayment or underpayment of royalties against Capitol. Second, Capitol argues that claims based on royalty statements rendered before May 11, 2009 should be dismissed because the recording agreements at issue contain a three-year limitations provision. Third, Capitol argues that Dale Bozzio's fourth claim, for violation of California's Unfair Competition Law, does not satisfy Federal Rule of Civil Procedure 9(b)'s heightened pleading requirement. Each of these arguments lacks merit and should be rejected for the reasons set forth below.

ARGUMENT

A motion to dismiss under Rule 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. *Ileto v. Glock. Inc.*, 349 F.3d 1191, 1199–200 (9th Cir. 2003). To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, a complaint must provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The statement need only give the defendant "fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of L.A.*, 828 F.2d 556, 561 (9th Cir.1987). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973).

I. Bozzio has Standing to Assert Each of the Claims in the FAC

Capitol asserts that Bozzio does not have "standing to bring this action," in connection with the fact that she is not a named party to the Personal Services Agreement, as amended by the Loan-Out Agreement (Mot. 1); however, Bozzio has Article III standing and is fully entitled to sue under the agreements at issue. As alleged in the FAC, she has suffered actual injury due to the wrongful

underpayment and nonpayment of artist royalties (FAC ¶ 63). Bozzio is the real party in interest to the recording agreements at issue. As alleged, her creative services as a singer, songwriter, and performer were at the heart of those agreements (FAC ¶¶ 64–68). Bozzio is the third-party beneficiary of the Loan-Out Agreement. As alleged, that agreement was made expressly for her benefit (FAC ¶¶ 69–74). Bozzio has standing with respect to her California Unfair Competition Law claim. As alleged, Bozzio has a vested legal interest in earned but unpaid royalties wrongfully withheld by Capitol (FAC ¶ 160).

The essence of Capitol's standing argument boils down to an assertion that Bozzio waived her right to sue. Specifically, Capitol argues that the entire FAC should be dismissed because Bozzio purportedly expressly waived her right to assert any claims regarding nonpayment or underpayment of royalties against Capitol.

The record industry's widespread "purposeful neglect" of its royalty participants has engendered a multitude of litigation involving similar issues. The standard nature of the industry's recording contracts means that the same contract language appear frequently in the cases. As a result, there are two United States District Court decisions that readily dispose of Capitol's arguments.

Clinton v. Universal Music Group, Inc. conclusively establishes that the entire issue of waiver is a question of fact that cannot be decided on a Rule 12(b)(6) motion. *See* (In Chambers) ORDER Granting Defendants' Amended Request for Judicial Notice and Denying Defendants' Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted, *Clinton v. Universal Music Group, Inc.*, No. 2:07-cv-00672 PSG (C.D. Cal. July 26, 2007), Dkt. No. 37 ("*Clinton* Order") (attached as Exhibit A to the accompanying "Request for Judicial Notice in Support of Plaintiff's Opposition to Defendant's Motion to Dismiss First Amended Class Action Complaint for Failure to State a Claim Under Federal Rule of Civil Procedure 12(b)(6)" ("RJN")), *issue of standing aff'd on separate motion*, 2008 WL 2491699 (June 19, 2008), *rev'd on other grounds, standing issue specifically aff'd*, 376 Fed. App'x 780, 781 (9th Cir. Apr. 20, 2010).

Catena v. Capitol Records, LLC held that a similar waiver provision with identical language was ambiguous, and conclusively establishes that one interpretation of an ambiguous

contract cannot be chosen over another on a Rule 12(b)(6) motion. *See* Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *Catena v. Capitol Records, LLC*, No. CV 12-00806 MMM (July 11, 2012), Dkt. No. 30 ("*Catena* Order") (RJN Ex. B).

A. Whether Bozzio Has Waived Her Right to Sue Is a Question of Fact that Cannot Be Decided on a Rule 12(b)(6) Motion

Capitol's contention that Bozzio waived her right to assert claims arising from her contract implicates questions of fact that cannot be resolved on a motion to dismiss.

"Under California law, waiver is a question of fact." *Intel Corp. v. Hartford Acc. & Indem. Co.*, 952 F.2d 1551, 1559 (9th Cir. 1991). Waiver is generally an issue of fact unless "only one reasonable inference can be drawn from the evidence." *Kossler v. Palm Springs Devs., Ltd.*, 101 Cal. App. 3d 88, 99 (1980); *Aetna Cas. & Sur. Co. v. Richmond*, 76 Cal. App. 3d 645, 652 (1978). Because the intent of the parties is paramount, this is true regardless of whether the waiver is implied or express. *Waller v. Tex. Ins. Exch., Inc.*, 11 Cal. 4th 1, 31 (1995). Accordingly, in the face of contrary allegations, a Rule 12(b)(6) motion is not the appropriate stage in the proceedings for a court to determine whether a plaintiff has waived her right to sue. *See Clinton* Order at *9–10.

Capitol's reliance on only selective evidence, such as its own self-appointed interpretation of the contract and its emphasis of certain contractual language to the exclusion of other relevant facts, does not establish that there is "only one reasonable inference" to be drawn from the evidence, particularly at this stage of the proceedings when all factual allegations in the complaint must be accepted as true and all reasonable inferences must be drawn in Plaintiff's favor. *Kossler*, 101 Cal. App. 3d at 99; *see also Usher*, 828 F.2d at 561.

Capitol's sole "evidence" of Bozzio's alleged waiver of her right to assert claims arising from the Personal Services Agreement, as amended, is a single provision of the "Artist's Declaration" contained in the Loan-Out Agreement in which Bozzio stated, in part, that she would "look solely" to Missing Persons, Inc. for payment of royalties (FAC ¶ 78; FAC, Ex. B 7–8; Mot. 6). But even assuming for the moment that this provision means what Capitol says it means, other courts have previously found that a similar contractual provision did not affect the individual plaintiff's right to sue. In *Celador International Ltd. v. Walt Disney Co.*, 347 F. Supp. 2d 846

(C.D. Cal. 2004), the defendants claimed that a provision in the contract under which the individual plaintiff agreed to "'look solely'" to another party for "'any and all compensation to which [he] may be entitled,'" destroyed the individual plaintiff's standing to bring a contract action against the defendants. *Celador*, 347 F. Supp. 2d at 858. Although the Court noted that the "provision at issue may or may not preclude [the individual plaintiff] from prevailing on the merits," that was not the appropriate question presented by a motion to dismiss and therefore concluded that the individual plaintiff had standing. *Id.* Although here, Capitol has couched its contention in terms of waiver as opposed to standing, the *Celador* decision still applies as the court implicitly recognized that a contractual provision like that relied upon by Capitol presents a question of fact going to the plaintiff's ability to ultimately prevail on the merits, not to her right to bring a suit in the first instance. *See id*. And *Celador* is consistent with the legal principle that waiver is generally a question of fact. *Kossler*, 101 Cal. App. 3d at 99; *Aetna Cas. & Sur. Co.*, 76 Cal. App. 3d at 652.

None of the decisions cited in Capitol's waiver argument discuss the issue of waiver specifically; none of the decisions state that waiver is an issue of law to be decided by the court, rather than an issue of fact not suitable for a Rule 12(b)(6) motion; none of the decisions hold that a waiver provision like the one in this case destroys a party's standing. Additionally, two of the decisions cited by Capitol in its waiver argument are decisions on motions for summary judgment or adjudication, where—unlike in a Rule 12(b)(6) motion—the Court is allowed to make factual determinations. *See AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 814, 821–22 (1990); *Mercury Cas. Co. v. Maloney*, 113 Cal. App. 4th 799, 802–04 (2003).

B. Whether Capitol Is Estopped From Asserting Waiver Is a Question of Fact that Cannot Be Decided on a Rule 12(b)(6) Motion

Capitol's reliance on a single contractual provision ignores other issues of fact that bear on the question of waiver. The FAC alleges that Capitol has made a practice of dealing directly with Bozzio even after Missing Persons, Inc. was formed and the Loan-Out Agreement signed, and that this conduct precludes Capitol from relying on the Waiver Provisions (FAC ¶¶ 89–92). These allegations are enough to require denial of Capitol's motion. Moreover, Capitol mischaracterizes the allegations regarding its own conduct which suggest that Capitol is barred from any such claim

of waiver.

Specifically, as alleged in the FAC, Capitol had Bozzio agree that certain advances made to Missing Persons, Inc. would be recoupable from any and all publishing income payable to Bozzio's publishing entity Life After Music (FAC ¶ 90; FAC, Ex. C). Further, as alleged in the FAC, publisher royalty statements and payments are sent directly to Bozzio, with her name designated as the payee name (FAC ¶ 91; FAC, Ex. D). The FAC alleges that such conduct induced Bozzio's reasonable belief that any waiver Capitol now seeks to enforce has been relinquished (FAC ¶ 92). Collectively, these and other allegations raise an issue of fact as to whether Capitol, as a result of its own conduct, is precluded from claiming that Bozzio waived her right to assert claims arising from the Personal Services Agreement, as amended, that cannot be resolved on a motion to dismiss for failure to state a claim. *See Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv.*, 911 F.2d 242, 245 (9th Cir. 1990).

Under similar facts, United States District Judge Philip S. Gutierrez denied an analogous motion to dismiss brought against a recording artist by another "Big Four" record industry giant, Universal Music Group. *See Clinton* Order.

George Clinton was a recording artist, composer, performer, and a member of the funk group Parliament. *Clinton* Order at *1. Defendant UMG was the successor-in-interest to Casablanca Records, Inc. *Id.* In 2007, Clinton sued UMG for breach of contract and several other claims arising from failure to pay royalties. *Id.* at *3. In 1980, Clinton's loan-out company, P-Funk, Inc., entered into the recording agreement at issue with Casablanca Records for the recording and record production services of Clinton, the artist, performing professionally as Parliament. *Id.* at *1–2. This agreement was substantially similar to Bozzio's Personal Services Agreement, as amended: it provided that Clinton would record performances for Casablanca, that Casablanca would exploit those recordings, and that Casablanca would pay royalties to the P-Funk loan-out for income generated from the Parliament recordings made by Clinton. *Id.* at *2.

As part of the agreement, Clinton signed a letter of inducement that contained a waiver provision that was similar to Bozzio's, reading, in part, ". . . I shall look solely to Producer [P-Funk] for any and all royalties, recording fees and other monies which may be payable to me . . . *I*

shall not assert any claims for such monies against you[.]" *Id.* (emphasis in original order).

Defendants moved to dismiss Clinton's breach of contract claims pursuant to Rule 12(b)(6) on several grounds, including that Clinton "expressly and unambiguously waived" his right to sue by signing the letter of inducement. *Id.* at *9. Plaintiff responded that Defendants' conduct precluded Defendants from relying on this waiver provision. *Id.* Specifically, Clinton alleged in his FAC that, among other things, Defendants sent royalty statements and payments directly to Clinton, and that some of these checks were addressed to George Clinton, not P-Funk.

Judge Gutierrez denied Defendants' motion, finding Clinton's argument persuasive: "Taking these allegations as true, which the Court must do on a motion to dismiss, the Court finds that at the very least, questions of fact remain as to whether Defendants' acts induced Plaintiff's reasonable belief that the waiver has been relinquished." *Id.* at *10.

The Ninth Circuit, on appeal of a different order in this same case, affirmed the district judge as to standing and waiver: "Taken in the light most favorable to Clinton, the facts suffice to make Clinton either a third party beneficiary or a real party in interest. UMG is estopped, as a result of its own conduct, from relying on any purported waiver in the Inducement Letter." *Clinton*, 376 Fed. App'x at 781.

In the present case, Capitol makes two arguments in support of its contention that its conduct was not enough to relinquish its waiver. Both arguments are misguided.

First, Capitol asserts that it dealt with Dale Bozzio not directly as an individual but rather as a representative of her publishing company, Life After Music. This is incorrect because, as alleged in the FAC, Bozzio was "doing business as Life After Music" (FAC ¶ 22).

Second, Capitol asserts that the royalties in question were not artist royalties but rather publishing royalties (Mot. 11–12). The purported distinction Capitol draws between certain types of royalties is not a sufficient basis for the Court to conclude that Capitol's acts did not induce Bozzio to reasonably believe that the waiver had been relinquished: the publishing royalty statements in question were mailed to Bozzio's home in Massachusetts, were directed to "payee name: DALE BOZZIO," and listed iconic Missing Persons songs such as "Color in Your Life" and "Destination Unknown" (FAC, Ex. D).

Both arguments demonstrate the fact-bound nature of this inquiry, which is inappropriate on a Rule 12(b)(6) motion. Moreover, Capitol does not dispute the essential character of the amendments in question (FAC, Ex. C). These are amendments to the Missing Persons contracts, with the same contract number (6722), involving advances to be paid to Missing Persons, Inc., and from there to the artists. These amendments made the advances jointly and severally recoupable from any and all publishing income payable to Bozzio's d/b/a for songs written or co-written by Bozzio. These agreements establish a critical nexus between Bozzio and Capitol, and between Bozzio's publishing royalties and the artist royalties paid by Capitol. This nexus is enough to require denial of Defendant's motion.

C. Whether the Exception to the Waiver Has Been Triggered Is a Question of Fact that Cannot Be Decided on a Rule 12(b)(6) Motion

Still another issue of fact bears on the question of waiver. As alleged in the FAC, the waiver clause in the Loan-Out Agreement contains an exception that permits individual band members to sue Capitol directly under certain circumstances (FAC ¶ 87). The agreement provides that the waiver is in force,

> unless Capitol shall, pursuant to the [Loan-Out Agreement], enforce its rights directly against the undersigned, in which case the undersigned shall have the right to look to Capitol for such payment, provided [Missing Persons, Inc.] shall not have the right, and shall not, look to Capitol for payment.

(FAC, Ex. B p. 7, ¶ 1.d.)

Capitol contends that the FAC contains no allegations in connection with this exception (Mot. 4, 6 n.2). But Capitol has overlooked allegations in the FAC that demonstrate that this exception has been triggered, both by action of the contract and by conduct of the Defendant (FAC ¶¶ 87, 90). These allegations are enough to survive a Rule 12(b)(6) motion.

As alleged, the condition enabling the exception to apply was met when Missing Persons, Inc. became incapacitated and lost the right to look to Capitol for payment (FAC ¶ 87). As alleged, when Missing Persons satisfied its obligations to record masters under the Personal Services Agreement, as amended, the loan-out company lost its entitlement to provide Dale Bozzio's creative services to Capitol. Paragraph 1g of the Artist's Declaration in the Loan-Out Agreement

provides that in such a circumstance, Capitol's rights "shall be enforceable" against individual band members. By action of the contract, now Capitol's rights "shall be enforceable" against Bozzio as an individual; consequently, under action of the contract, Bozzio "shall have the right to look to Capitol" for payment (*ibid.*).

Furthermore, after the Loan-Out Agreement was signed, Capitol made certain advances on royalties to Missing Persons, Inc. (FAC ¶ 90). A set of separate agreements provided that these advances would be recoupable from, among other sources, publishing income paid to Dale Bozzio's d/b/a, the publishing entity Life After Music (*ibid.*). Capitol bound Dale Bozzio, individually, apart from the loan-out company and apart from the band, to these sets of agreements (*ibid.*). Therefore, Capitol by its own conduct has enforced its rights directly against Dale Bozzio, triggering the exception to the Waiver Provision.

In sum, Capitol asks this Court to dismiss Bozzio's claims arising from the Personal Services Agreement, as amended, based on a set of waiver-related arguments that necessarily require a factual inquiry that is inappropriate on a Rule 12(b)(6) motion. Accordingly, Capitol's Motion to Dismiss should be denied.

D. As the Court in *Catena* Found, Bozzio's Interpretation of the Waiver Provision Is Reasonable and Must Be Accepted as True on a Rule 12(b)(6) Motion

Capitol's argument that the express terms of the recording agreement preclude Bozzio from suing Capitol for the payment of royalties should be denied. United States District Judge Margaret Morrow analyzed identical contract language and decided this exact issue in a case alleging that Capitol failed to pay royalties to Felice Catena, heir to the estate of a member of the musical group The Knack. *See Catena* Order. Judge Morrow found ambiguity in the plain text of the waiver provision, and found additional support for a finding of ambiguity by applying traditional principles of contract interpretation. *Catena* Order at *8–14. Accordingly, she denied Capitol's motion to dismiss. *Id.* at *13–14.

"A court may grant a motion to dismiss based on interpretation of a contract so long as the contract's terms are unambiguous. If the contract's terms are reasonably susceptible of more than one meaning, however, the motion must be denied." *Id.* at *5 (internal citations omitted).

California law governs interpretation of the recording agreement (*see* FAC ¶ 45; FAC, Ex. A ¶ 25). Under California law:

> In interpreting the provisions of a contract, the rules are well settled. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other. Courts must interpret contractual language in a manner which gives force and effect to every provision, and not in a way which renders some clauses nugatory, inoperative or meaningless. The contract must also be interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. Such intent is to be inferred, if possible, solely from the written provisions of the contract. In construing a contract which purports on its face to be a complete expression of the entire agreement, courts will not add thereto another term, about which the agreement is silent. When determining the intent of the parties, the court will consider a particular provision paramount over a general provision.

The Ratcliff Architects v. Vanir Constr. Mgmt., Inc., 88 Cal. App. 4th 595, 601–02 (2001) (internal citations and quotation marks omitted).

As alleged in paragraph 76 of the FAC, the waiver provision in the Personal Services Agreement provides:

> All payments under the [Personal Services] Agreement in excess of the applicable union scale shall be paid to Missing Persons, 11935 Laurel Hills Road, Studio City, California 91604, or such other payee as [Missing Persons] may notify Capitol in writing at any time. Terry Bozzio, Dale Bozzio and Warren Cucurullo each agree to look solely to the partnership "Missing Persons" for payment of all royalties and/or fees, as the case may be, and will not assert any claim in this regard against Capitol or attempt to prevent the manufacture, sale or distribution of phonograph records manufactured from masters recorded under the Agreement.

As alleged in paragraph 78 of the FAC, the waiver provision in the Loan-Out Agreement provides:

> For the express and direct benefit of Capitol, I hereby: . . . [a]gree to look solely to [Missing Persons, Inc.] for the payment of my fees and/or royalties, as the case may be, and will not assert any claim in this regard against Capitol or attempt to prevent the manufacture, sale, licensing or distribution of records manufactured from the masters produced under the [Loan-Out Agreement], unless Capitol shall, pursuant to the [Loan-Out Agreement], enforce its rights directly against the undersigned, in which case the undersigned shall have the right to look to Capitol for such payment, provided [Missing Persons, Inc.] shall not have the right, and shall not, look to Capitol for payment.

Capitol asserts that the plain language barring "any claim" is limitless, broad, and all-encompassing (Mot. 8). Capitol asserts that the plain language precludes any and all lawsuits brought by individual band members against Capitol for underpayment of royalties (Mot. 1, 6).

While this interpretation may hold some surface appeal, it cannot be accepted as the uncontroverted meaning of this contract provision. *See Catena* Order at *9.

The plain text of these clauses provide that the payments Capitol makes to group members under the agreement "shall be paid" to the partnership, and then, as amended, to the loan-out. It thus describes the manner in which Capitol is to make royalty payments to the members of Missing Persons. With this in mind, the "look solely to" and "assert any claim" language that Capitol emphasizes is a reference to the recourse individual members of Missing Persons have available to obtain the "payment of my fees and/or royalties" that Capitol had *already* paid pursuant to the first part of the clause. In other words, *after* Capitol made required royalty payments, first to the Missing Persons partnership, then later to Missing Persons, Inc., individual band members could only recoup their percentage of the payment made by Capitol under the royalty schedule in the Personal Services Agreement from the partnership/loan-out company.

Judge Morrow, faced with the same contract language, concluded this was a reasonable interpretation. *See Catena* Order at *10. Just like the Catena action, the point of the Bozzio action, however, is that Capitol has *not* validly paid royalty payments under the record contracts and has instead *violated* those contracts by withholding royalties. This claim is distinct from a claim that the partnership or loan-out failed to pay its members profits that Capitol paid to it. *See id.* at *10.

Moreover, adopting the approach used by Judge Morrow, it becomes apparent that the interpretation Capitol offers runs afoul of many tenets of contract interpretation. *See id.* at *11–13.

As alleged, Capitol's interpretation would place Bozzio and the other individual band members in the position of suing their loan-out (*i.e.*, each other, themselves, and their band) for money none of them possesses—royalties wrongfully withheld by Capitol (FAC ¶ 84). This construction would leave individual band members with no recourse. This interpretation supports Bozzio's reading of the contract—Defendant's reading otherwise deprives Bozzio of the benefits of the contract entirely and results in absurdity. *See Battram v. Emerald Bay Cmty. Ass'n*, 157 Cal. App. 3d 1184, 1189 (1984).

Capitol counters that there is a remedy available because Missing Persons, Inc. is permitted to assert claims against Capitol, and in turn band members are free to seek recovery from Missing

Persons, Inc. (Mot. 9). This argument overlooks that the face of the agreement does not provide for any clear recourse for a member of Missing Persons in the event that Capitol withholds royalty payments altogether. On the contrary, the contract presumes a functioning loan-out corporation that has been fully paid by Capitol. The contract as a whole does not contemplate the incapacity of the band or the loan-out company. For example, the Personal Services Agreement provides that if a member of Missing Persons leaves the group, that member must still "look solely to the group partnership 'Missing Persons' for payment of all applicable royalties . . . ," but the contract is silent as to what happens if the group partnership itself breaks up (FAC, Ex. A, p. 37 ¶ 4). The Loan-Out Agreement does contain one lone provision that contemplates a non-functioning entity. A portion of the waiver provision refers to an occasion when Missing Persons, Inc. "shall not have the right, and shall not, look to Capitol for payment." But the reference of that eventuality is couched in regard to protecting Capitol's rights: if and only if Capitol first sues an individual band member, then that band member may sue Capitol directly, but even then only if the loan-out "shall not have the right, and shall not" do so itself. (It should be noted that utterly lopsided provisions such as this one permeate the contract. In all cases, the benefits flow in only one direction—in favor of Capitol, the sophisticated drafting party. *See, e.g.*, FAC, Ex. B, p. 3 ¶ 12; FAC, Ex B, p. 6 ¶ 1.c.)

The waiver provision cannot be read according to Capitol's interpretation because that interpretation allows Capitol to exploit artists' recordings without having to pay them royalties. Under Capitol's interpretation, an artist like Dale Bozzio, who is not being paid, has no recourse. Capitol's position is that the artists are bound but the record label is not. Capitol can receive artists' services for free. This is an unreasonable expectation. Bozzio and other artists cannot have had the intent to agree to such a scheme. Moreover, the outcome of a windfall for Capitol and forfeiture for Bozzio is a prospect that the law abhors. *See Ballard v. MacCallum*, 15 Cal. 2d 439, 444 (1940).

Furthermore, also as alleged, Capitol's all-encompassing interpretation of the waiver provision directly conflicts with another contract provision that expressly allows for individual band members' royalty claims (FAC ¶ 83). This conflict supports the existence of contract ambiguity because "[t]he whole of a contract is to be taken together, so as to give effect to every

part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Confronted with its own interpretations of the waiver provision and the three-year limitations provision, Capitol fails to demonstrate why there is a need for a limitations section that applies individually to band members if those members cannot sue individually. The explanation Capitol offers as to why "there is no conflict" depends entirely on the 1983 Loan-Out Agreement (Mot. 11). But Capitol does not explain how, under its own construction, these two provisions could have coexisted harmoniously in the 1982 Personal Services Agreement in which they both appear.

In the present case, Bozzio attached and incorporated both the Personal Services Agreement and the Loan-Out Agreement into the FAC (*see* FAC ¶¶ 44, 48; FAC, Ex. A; FAC, Ex. B). She alleged in the FAC the meaning that she ascribed to the waiver provisions. Specifically, Bozzio alleged that the waiver provisions do not encompass actions based on Capitol's failure to properly account for and pay royalties (FAC ¶ 80). Bozzio alleged that the waiver provisions state that once Capitol has properly accounted for and paid royalties to Missing Persons, Inc., then band members may not seek to compel Capitol to referee internal disputes among band members over the proper division and distribution of those royalties, and may not seek to compel Capitol to double-pay royalties wrongfully withheld from band members by the band itself or from one band member by another (*ibid.*). As discussed above, this interpretation is reasonable. In fact, it is precisely the meaning that the *Catena* court found to be a reasonable construction.

Capitol argues that since the agreements do not expressly mention "internal disputes," then as a matter of law this Court must reject an interpretation that concerns internal disputes (Mot. 8). Capitol contends that "any claim" means just that, and Bozzio's interpretation is in "direct conflict" with this phrase (*ibid.*). Capitol's argument fails because it fundamentally misapprehends what an ambiguous contract provision is. The lack of any express context, definition, or limitation (as to internal disputes or otherwise) does not *save* the contract language from ambiguity—such holes are precisely what *make* the contract language ambiguous. Here, Bozzio's interpretation is not premised on a condition not contained in the contract, nor is Bozzio's interpretation unreasonable; thus, the decisions cited by Capitol are inapposite (Mot. 8–9). In fact, it is impossible to argue that Bozzio's interpretation is unreasonable in light of the *Catena* decision, which Capitol ignores.

(Capitol may attempt to distinguish *Catena* because *Catena* involved a partnership rather than a loan-out company. It is true that Judge Morrow was troubled that, under Capitol's interpretation, the recourse of the individual band members was seated in a "partnership," the actual existence of which was nowhere in the record. *Catena* Order at *11–12. But this factor was not dispositive. Judge Morrow had already found ambiguity in the plain text of the provision. *Id.* at *8–10.)

The Court cannot conclude that Capitol's interpretation is the only reasonable construction of the contract, and Capitol's motion should be denied. *See Catena* Order at *13–14. Bozzio has alleged that the waiver provisions are limited waivers that do not encompass the claims asserted. For the reasons above, the waiver provision is reasonably susceptible of the meaning alleged. The FAC cannot be dismissed on the ground that an express waiver precludes the claims asserted therein.

In sum, the supposed waiver that Capitol relies upon does not warrant the dismissal of this action for failure to state a claim. As set forth above, the *Clinton* Order holds that the entire issue of waiver as a whole is a question of fact, which is improper on a Rule 12(b)(6) motion. In that connection, the related issues of whether Capitol's own conduct precludes it from relying on the waiver, and whether certain events have triggered the exception to the waiver, are likewise factual questions that cannot be resolved at this stage of the proceedings. Further, the *Catena* Order establishes that an independent reason that Capitol's motion should be denied is that the contractual language is ambiguous. The *Catena* court performed the same analysis of Capitol's identical contract language and found that Bozzio's interpretation, as pled in the FAC, is reasonable. Capitol's interpretation of the contract cannot be accepted on a Rule 12(b)(6) motion. Bozzio's interpretation, under which the waiver provision does not encompass the claims asserted in the FAC, must be accepted as true at this stage.

II. Bozzio's Claims Are Not Subject to the Three-Year Limitations Clause

Capitol's argument that Bozzio's remedies should be limited to the underpayment of royalties occurring in the last three years is incorrect (*see* Mot. 13–15). Capitol bases the argument on the following allegedly binding contractual language:

> At any time within three (3) years *after any royalty statement is rendered to me hereunder*, I shall have the right to give Capitol written notice of my intention to examine Capitol's books and records with respect to such statement. . . . Such examination shall be made during Capitol's usual business hours at the place where Capitol maintains the books and records which related to me and *which are necessary to verify the accuracy and completeness of the statement or statements specified in my notice to Capitol and my examination shall be limited to the foregoing*. . . . *Capitol's sole obligation to me shall be to furnish me with all relevant information specifically showing sales or gratis distribution of phonographic records as to which royalties are payable to me hereunder* . . . . I shall be foreclosed from maintaining any action, claim or proceeding against Capitol in any forum or tribunal *with respect to any statement or accounting due hereunder* unless such action, claim or proceeding is commenced against Capitol in a court of competent jurisdiction within three (3) years *after such statement or accounting is rendered*.

(FAC, Ex. A, pp. 8–9 ¶ 4.f) (emphasis added).

Bozzio's claims are not subject to this clause for three reasons: (1) there is nothing in the record to suggest that the running of the limitations period has been triggered; (2) California's discovery rule applies; and (3) the clause does not apply to licensing.

A. Whether the Limitations Clause Has Been Triggered Is a Question of Fact that Cannot Be Decided on a Rule 12(b)(6) Motion

Capitol's argument seeking to limit Bozzio's claims to a three-year period is akin to a statute of limitations argument. Statute of limitations arguments are disfavored on motions to dismiss because they usually require the resolution of factual issues. *See, e.g., U.S. v. N. Trust Co.*, 372 F.3d 886, 888 (7th Cir. 2004) ("Dismissal under Rule 12(b)(6) was *irregular*, for the statute of limitations is an affirmative defense. A complaint states a claim on which relief may be granted whether or not some defense is potentially available. This is why complaints need not anticipate and attempt to plead around defenses." (citation omitted and emphasis added)).

Dismissal at this stage of litigation is inappropriate because there are clear outstanding factual issues that cannot be resolved. *See, e.g., Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980) ("When a motion to dismiss is based on the running of the statute of limitations, it can be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled."); *In re Jackson Lockdown/MCO Cases*, 568 F. Supp. 869, 886 (E.D. Mich. 1983) (holding that the court should decline to rule on a motion to dismiss raising statute of limitations issues where factual determinations are necessary).

Here, Capitol's argument assumes several factual issues which cannot be adjudicated on this Motion to Dismiss. For example, in order for the three year limitation on remedies to theoretically apply, Capitol would have had to render an appropriate "royalty statement." The rendering of a royalty statement is one of the triggering events for the limitations period to apply. Yet, there is nothing in the record at this stage of the litigation to demonstrate that Capitol has met this condition precedent. The inquiry should stop here.

Moreover, interpretation of Capitol's alleged limitations clause requires additional factual determinations that are similarly inappropriate for resolution on a motion to dismiss. The clause requires Capitol to provide documents that are "necessary to verify the accuracy and completeness of the statement or statements . . . ." Again, there is nothing in the record as to whether Capitol met this obligation, which means that the Court must make factual findings outside of Bozzio's FAC. Therefore, the Motion must be denied.

B. The Discovery Rule Precludes Capitol's Attempt to Limit Damages to a Three-Year Period

California's well-established "discovery rule" precludes Capitol's imposition of a three-year limitations period on damages. "The general rule is that a cause of action accrues when the wrongful act is done . . . . But under the delayed discovery rule, a cause of action will not accrue until the plaintiff discovers or should have discovered . . . *all* the facts essential to the cause of action." *Prudential Home Mortg. Co. v. Superior Court*, 66 Cal. App. 4th 1236, 1246 (1998). (emphasis added) In finding that the discovery rule applies to breach of contract actions, the California Court of Appeal noted:

> A common thread seems to run through all the types of actions where courts have applied the discovery rule. The injury or the act causing the injury, or both, have been difficult for the plaintiff to detect. In most instances, in fact, the defendant has been in a far superior position to comprehend the act and the injury.

April Enters. Inc. v. KTTV, 147 Cal. App. 3d 805, 831 (1983) ("*KTTV*"). The court distinguished the situation in many typical contract actions where there is a "purchase of widgets . . . [and] . . . the buyer is well aware the contract has been breached when the date for delivery arrives and he has not received his widgets." *Id.*

Here, as in *KTTV*, application of the discovery rule precludes Capitol's attempt to limit damages to a three-year period. Like *KTTV*, Capitol was in "a far superior position to comprehend the act *and* the injury." *Id.* (emphasis added). For example, the FAC alleges that "white papers" were commissioned with the intent to conceal systematic breaches of the contract (FAC ¶ 16). The FAC also alleges that the accounting statements misled artists because they failed to properly account for licensing of the music (FAC ¶ 17). Bozzio's ability to discover the breaches was further hampered due to "non-disclosure agreements signed between Music Streaming Providers and record labels . . . . There is little transparency about how or if that money makes its way to artists" (FAC ¶ 42). Consequently, "artists are not provided with any details about these payments" (*ibid*). Finally, the FAC alleges that Bozzio would not have been aware of the breach at least until the Ninth Circuit's decision in *F.B.T. Productions.*, 621 F.3d at 964–67. All of these facts are sufficient to demonstrate that the discovery rule applies in this case and defeats Capitol's argument that damages should be limited to a three year period.

C. The Limitations Clause Does Not Apply to the Subject Matter of this Litigation

The gravamen of Bozzio's FAC concerns Capitol's accounting for royalties arising from digital downloads, ringtones, and streaming music (FAC ¶ 2). Bozzio contends these should have been categorized as licenses and subject to the corresponding royalty payment (*ibid.*). Yet, the contractual limitations clause on which Capitol relies is ambiguous as to whether it is obligated to provide information on that issue. For example, the clause states that Capitol's "sole obligation . . . shall be to furnish me with all relevant information specifically showing sales or gratis distributions of *phonograph* records as to which royalties are payable to me hereunder" (FAC, Ex. A, p. 9–10 ¶ 4.f.) (emphasis added). The clause appears to limit Bozzio's right to receiving information relevant only to *phonographic* record sales where her real interest is in masters licensed. The clause is ambiguous on these matters and should not be resolved on a motion to dismiss.

As the foregoing demonstrates, Capitol's argument that Bozzio's remedies should be limited to a three-year period should be rejected. The Motion to Dismiss should be denied.

III. Bozzio Is Not Required to Plead Her Unfair Competition Law Claim With Particularity Under Rule 9(b)

The predicate for Bozzio's California Unfair Competition Law ("UCL") claim is breach of contract. Bozzio alleges that, with respect to income generated from the distribution of digital forms of music, defendants adopted a uniform policy and system-wide practice of underpaying their musicians, producers, and royalty participants by applying the less favorable formula for physical products sold rather than the appropriate, more generous formula for masters licensed (FAC ¶ 6). This Court is among the many that have already correctly recognized that systematic breaches of contracts may constitute violations of the UCL. *See, e.g.*, *James v. UMG Recordings*, Nos. C 11-1613 SI, C 11-2431 SI, 2011 WL 5192476, at *4–5 (N.D. Cal. Nov. 1, 2011); *Beltran v. Capitol Records, LLC*, No. 12-cv-1002 YGR, 2012 U.S. Dist. LEXIS 82025, at *8–9 (N.D. Cal. June 13, 2012); *In re Facebook PPC Adver. Litig.*, Nos. 5:09-cv-03043 JF, 5:09-cv-03519 JF, 5:09-cv-03430 JF, 2010 WL 3341062 (N.D. Cal. Aug. 25, 2010). Capitol cannot now attempt to rewrite Bozzio's UCL claim to make it into one that sounds entirely in fraud.

Capitol ignores this authority and argues instead that the allegations of this FAC (which are virtually identical to the claims made in the *Beltran* case before this Court and the *James* case before Judge Illston) allege fraud under the UCL and therefore must meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b) (Mot. 15). But a fair reading of the FAC demonstrates that this case does not "sound in fraud" and therefore does not need to meet the requirements of Rule 9(b). Since Bozzio has established that another prong of a violation of UCL has been met, and Capitol does not deny this, Capitol's motion to dismiss Bozzio's UCL claim should be denied.

The UCL forbids any business act or practice that is unlawful, unfair, or fraudulent. Bus. & Prof. Code §§ 17200, *et seq.* "Because Business and Professions Code section 17200 is written in the disjunctive, it establishes three varieties of unfair competition – acts or practices which are unlawful, or unfair, or fraudulent. 'In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa.'" *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996) (citations omitted); *see also Somerville v. Stryker Orthopaedics*, No. C 08-02443 JSW,

2009 WL 2901591, at *2–4 (N.D. Cal. Sept. 4, 2009). In order to bring a claim for violation of the UCL, a plaintiff "must establish that the practice is either unlawful (*i.e.*, is forbidden by law), unfair (*i.e.*, harm to victim outweighs any benefit) or fraudulent (*i.e.*, is likely to deceive members of the public)." *Albillo v. Intermodal Container Servs., Inc.*, 114 Cal. App. 4th 190, 206 (2003).

The substantive law is California state law. Procedurally, in the Ninth Circuit:

> [w]hile fraud is not a necessary element of a claim under the CLRA and UCL, a plaintiff may nonetheless allege that the defendant engaged in fraudulent conduct. A plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of that claim. In that event, the claim is said to be "grounded in fraud" or to "sound in fraud," and the pleading . . . as a whole must satisfy the particularity requirement of Rule 9(b).

Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009) (internal citations and quotation marks omitted, ellipses in original).

Capitol cites multiple decisions relating to what needs to be pled when a complaint is "grounded in fraud," yet Capitol ignores the fundamental threshold issue, which is to determine whether *this* complaint is grounded in fraud. Capitol sidesteps this analysis entirely and simply quotes back the sentence of the FAC where Bozzio recites the language of the UCL statute, which, concededly, does contain the word "fraudulent" (Mot. 15).

Capitol does not, because it cannot, argue that Bozzio has "allege[d] a unified course of fraudulent conduct and rel[ied] entirely on that course of conduct as the basis of that claim." *Kearns*, 567 F.3d at 1125. As set forth above, Bozzio has alleged systematic breaches of contract in which Capitol engaged in a uniform business practice, for many years, by consistently paying artists based on the lower of the two royalty payment calculations. Capitol continued its systematic breach of the contracts despite Ninth Circuit authority holding that such a practice was wrongful. *See F.B.T. Prods.*, 621 F.3d at 964–67. Bozzio has pled the elements of breach of contract and alleged that this breach is occurring on a Class-wide basis.

In the present case, the gravamen of Bozzio's FAC for systematic breaches of contract clearly involves conduct covered by the unfair prong. In a case involving a virtually identical contract between an artist and a recording studio, Judge Susan Illston held UCL claims can be based on systematic breaches of contract, which is exactly what is alleged in the FAC. *James*,

2011 WL 5192476, at *4–5. Further, Judge Rogers has found that "[s]uch allegations—a systematic breach of contracts with a group of similarly situated parties—are sufficient to state a claim for an unfair business practice in violation of the UCL." *Beltran*, 2012 U.S. Dist. LEXIS 82025, at *8–9. Bozzio's allegations are more than sufficient to state a UCL claim.

A UCL claim can be based on any of its three separate and distinct prongs. The fact that Capitol does not argue that the entire FAC sounds in fraud, and does not contest that Bozzio has adequately pled the unfair prong under Rule 8, should end this inquiry. *See Somerville*, 2009 WL 2901591, at *3.

The cases cited by Capitol in support are all inapposite. Each dealt with a complaint that was "grounded in fraud." *See, e.g., Kearns*, 567 F.3d at 1126-1127 (alleging a false advertising scheme); *Snyder v. Ford Motor Co.*, No. C-06-0497 MMC, 2006 U.S. Dist. LEXIS 63646, at *2–3 (N.D. Cal. Aug. 24, 2006) (finding that the complaint was "grounded in fraud."); *Rosal v. First Fed. Bank*, 671 F. Supp. 2d 1111, 1128 (N.D. Cal. 2009) (same); *Lazar v. Superior Court*, 12 Cal. 4th 631, 635–37 (1996) (holding, unremarkably, that allegations of "intentional fraud" are subject to a particularity requirement); *Swartz v. KPMG LLP*, 476 F.3d 756, 757 (9th Cir. 2007) (same); *Pegasus Holdings v. Veterinary Ctrs. of Am., Inc.*, 38 F. Supp. 2d 1158, 1159, 1166 (C.D. Cal. 1998) (involving allegations of securities fraud). Capitol's reliance on these cases, therefore, is entirely irrelevant to the issue before this Court because the gravamen of Bozzio's FAC is not "grounded in fraud."

Even if the FAC is "grounded in fraud," the FAC sufficiently alleges fraud. As an initial matter, Capitol misstates the pleading requirement for pleading fraud for UCL claims. Since the fraudulent prong of the UCL does not require the same proof as common law fraud, a plaintiff need only plead those elements necessary to meet the fraudulent prong of the UCL, not all the elements of common law fraud. *Somerville*, 2009 WL 2901591 at *2–4. Furthermore, Capitol overstates the pleading requirements under Rule 9(b). While Rule 9(b) requires that fraud be alleged with specificity, it does not require the pleader to go into minute detail, especially when a complaint "encompasses events, transactions, and conduct" that span years. *In re Equity Funding Corp. of Am. Sec. Litig.*, 416 F. Supp. 161, 181 (C.D. Cal. 1976).

In addition, when the plaintiff has alleged concealment, instead of an affirmative misrepresentation, as was done here, less specificity is required. "The pertinent question in a concealment case is not who said what to whom." *Vega v. Jones, Day, Reavis & Pogue* 121 Cal. App. 4th 282, 296 (2004). In the present case, Bozzio has sufficiently alleged what specific information was intentionally concealed from Bozzio and all others similarly situated (*see* FAC ¶ 16). Given the inequality in access to information between Bozzio and Capitol, Bozzio has adequately alleged a violation of the UCL, even if this Court accepts Capitol's incorrect contention that a complaint for systematic breaches of contract is one "grounded in fraud."

IV. Bozzio Did Not Waive or Limit Any Statutory Rights

Even if this Court rules against Bozzio on the waiver and limitations issues on the breach of contract claim, the UCL claim cannot be dismissed, because an individual does not waive or limit her statutory rights unless the waiver is established through clear and unmistakable language. The contractual clauses do not purport to limit any statutory rights. *See Metro. Edison Co. v. N.L.R.B.*, 460 U.S. 693, 708 (1983) ("[W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable."); *Martinez v. J. Fletcher Creamer & Son, Inc.*, No. CV 10-0968 PSG, 2010 WL 3359372, at *3 (C.D. Cal. 2010) (specifically holding that the statute must be expressly listed in the contract in order for there to be a "clear and unmistakable" waiver of a statutory right).

Paragraph 26 of the Personal Services Agreement specifically preserves Bozzio's statutory rights:

> If there shall exist any conflict between any provision of this agreement and any material statute, law or ordinance, the latter shall prevail, and the provisions of this agreement affected shall be curtailed, limited or eliminated to the extent (but only to the extent) necessary to remove the conflict . . . .

Here, in addition to the breach of contract claim, Bozzio alleges a separate *statutory* violation under the UCL (FAC ¶¶ 158–163). These UCL claims have been expressly upheld in several other similar music royalty litigation—including by this Court. *See James*, 2011 WL 5192476, at *4–5; *Beltran*, 2012 U.S. Dist. LEXIS 82025, at *8–9. UCL claims are subject to a

different, longer statute of limitations than the purported three-year period in the contract. For this additional reason, Capitol's Motion must be denied with respect to the UCL claims.

V. Alternatively, Bozzio Should Be Granted Leave to Amend the Complaint to Address Any Deficiencies Identified by the Court

Dismissal without leave to amend is improper unless it is clear that Bozzio's complaint cannot be saved by any amendment. *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998). Where the Court could "conceive of facts" that would make Bozzio's complaint viable, leave to amend should be granted. *Scott v. Eversole Mortuary*, 522 F.2d 1110, 1116 (9th Cir. 1975). Moreover, because the "purpose of pleading under the Rules 'is to facilitate a proper decision on the merits,'" leave to amend should be freely given absent evidence of undue delay, repeated failure to cure prior deficiencies by previously-allowed amendments, bad faith or a dilatory motive, undue prejudice or futility of any amendment. *Breier v. N. Cal. Bowling Proprietors' Ass'n*, 316 F.2d 787, 789–90 (9th Cir. 1963) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

Here, should the Court give credence to any of Capitol's claims, Bozzio alternatively requests leave to amend her complaint to address any such issues identified by the Court. None of the considerations identified above counsel against granting Bozzio leave to amend. Although Bozzio has amended her complaint once as of right, she has never requested or been granted leave to amend by the Court.

As a consequence, Bozzio alternatively requests leave to amend her complaint to address any issues the Court may identify in the FAC in response to Capitol's Motion to Dismiss.

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CONCLUSION

For the reasons stated herein, Bozzio respectfully requests that Capitol's Motion to Dismiss Bozzio's FAC be denied. Alternatively, Bozzio requests that she be granted leave to amend to address any deficiencies in her FAC.

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Respectfully submitted:

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